IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 291

MARION KOTCH, ET AL.,
Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,
Appellees.

ORIGINAL BRIEF OF APPELLEES.

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SYLLABUS.

(1) The states have been granted, by Act 7 of 1789, (Sec. 4) the right to regulate pilotage in conformity with the laws existing prior to August 7, 1789. Congress has never taken away the authority of the states over such regulation insofar as pilotage relates to foreign vessels. *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Ex Parte McNeil*, 13 Wall. 236.

(2) Congress, from the beginning, has recognized, because of the differences in conditions throughout the

country, the need of differences in pilotage regulations, and because of such differences that the regulation of pilotage requires no exclusive regulation by Congress.

(3) State pilots in Louisiana are not licensed as in many other states, but are officers appointed by the Governor. *Williams, et al., v. Payson, et al.*, 14 La. Ann. 7; *State ex rel Follette v. Egan*, 33 La. Ann. 230; *Levine v. Michel*, 35 La. Ann. 1121.

(4) The Governor has plenary power to commission pilots, subject only to the limitation that they be certified by the Board of River Port Pilot Commissioners as to competency, but mere competency does not entitle everyone to be commissioned by the Governor. *Act 54 of 1908 (§4).*

(5) Commissions issue only when there is a need for more pilots. The Governor is not compelled to commission any number of pilots, nor to select any individual or individuals for commissions, but may commission pilots in his discretion when vacancies exist. *Act 54 of 1908 (§4).*

(6) The Legislature of Louisiana has the authority to enact statutes regulating pilotage and to provide that only those commissioned by the Governor as state officers, shall become pilots, and the provision that an applicant for a commission shall serve an apprenticeship does not render the statute invalid. *Olsen v. Smith*, 195 U.S. 332.

(7) It is no part of the judicial function to substitute the judicial judgment for the legislative power, and to say the provision that one shall serve an apprenticeship is unwise because of the difficulty of certain individuals to serve such apprenticeship. The judicial function is exhausted with the discovery that the relationship between means and ends is not wholly vain and fanciful, but is expressive of the legislative judgment that the means chosen best serve the public interest. *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U. S. 251, 257; *Williams v. Mayor*, 289 U. S. 36.

(8) He who would successfully assail a law as unconstitutional must show that the feature of the act complained of operates to deprive him of some constitutional right, but mere inability to achieve public office does not come within the constitutional protection. *Plymouth Coal Company v. Penn.* 232 U. S. 540, 544; *Lehon v. City of Atlanta*, 242 U. S. 53; *Akins v. Kingsbury*, 247 U. S. 484, 489.

(9) The complaint that only those who have served an apprenticeship can be commissioned by the Governor as a pilot, does not come within any provisions of the Fourteenth Amendment, because no one has a constitutional right to be so commissioned, and since he has no constitutional right to be so commissioned, Louisiana may adopt any statutory regulation which to it seems desirable and may grant to the Governor an unlimited discretion in his choice of those to be commissioned. *Olsen v. Smith*, 195 U. S. 332, *Ring v. Oregon*, 276 U. S. 607.

(10) No substantial Federal question is presented because the constitutionality of a similar statute, enacted by the State of Texas, was held to be constitutional, and was used as the basis of the decision in another case involving the same point. *Olsen v. Smith*, supra, *Ring v. Oregon*, supra.

(11) No discrimination created by the statute is alleged by appellants, who merely allege that they, as members of the general public, for special reasons, cannot comply with the requirements of the statute, but that others, as members of the general public, may comply with the requirements of the statute, and thereby become commissioned as pilots. The statute shows no arbitrary or unreasonable discrimination operating as in *Yick Wo v. Hokpins*, 118 U. S. 256, to invade a constitutional right. The difference finds expression in *Gundling v. City of Chicago*, 177 U. S. 183.

THE ISSUE.

Appellants filed suit in a State Court of Louisiana, asking that Act 54 of 1908, as amended by Act 134 of 1942, be declared unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. In the alternative, they prayed that the amendment by Act 134 of 1942 be declared unconstitutional as violative of the Fourteenth Amendment. They made an alternative prayer for a mandamus. This plea disclosed their remedy, if any were needed.

THE JUDGMENT.

The appellees filed an exception of no cause of action, which is like the common law demurrer, which was upheld by the trial court. On appeal, the Supreme Court of Louisiana affirmed the judgment of the lower court. It did not pass upon the State question of the right of a mandamus, so that there is before this Court only the question of whether or not the statute, as amended, is violative of the rights guaranteed to the appellants by the Fourteenth Amendment.

THE ALLEGATIONS.

The appellants alleged that they are licensed river pilots, holding first class licenses from the United States; that they are well qualified, having been actively engaged as pilots on the Mississippi River and other waters, and have been so actively engaged for more than fifteen years; that Act 54 of 1908 conferred upon the Board of River Port Pilot Commissioners and on the commissioned pilots themselves, absolute power in respect to appointments; that by the statute, only those having the favor of the pilots can be appointed; that in the past the appellants have centered their activity largely to the port itself, but by Act 54 of 1908, are barred from piloting vessels between the Port of New Orleans and the passes at the mouth of the River; that coastwise shipping, which they are entitled to pilot, is far too small for them to earn a livelihood from such pilotage alone and that the amendment by Act 134 of 1942 closed the port to them and will force them to give up their occupation as pilots and seek other pursuits.

ACT 54 OF 1908, AS AMENDED.

Act 54 of 1908, in substance, provides that the Governor shall appoint, by and with the advice and consent of the Senate, three citizens, who shall form the Board of River Port Pilot Commissioners, who are removable by the Governor for cause, and who shall qualify by taking an oath of office.

The statute further provides:

> "That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return."

and that

> "There shall be twenty-eight (28) such pilots appointed and commissioned by the Governor immediately upon the promulgation of this act".

The act further provides that these 28 pilots shall be chosen from those pilots who have been actively and continuously engaged for one year previous in piloting sea-going vessels from the head of the Passes to the Port of New Orleans and return, and thereafter there shall be not less than 20 such pilots.

Section Four of Act 54 of 1908 is the source of the issue of unconstitutionality here presented. That Section provides as follows:

> "That whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold ex-

aminations, under such rules and regulations, and with such requirements as they shall have provided, with the Governor's approval, provided that no applicant shall be considered by said Board, unless he submits proper evidence of moral character and is a voter of this State, and shall have served six months' apprenticeship in his proposed calling, and upon the certificate of the Board to the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies".

As was said in *Steamship Company v. Joliffe*, 2 Wall. 450, 456:

> "'The object of the regulations established by the statute was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation.'"

Section 6 of Act 54 of 1908, provides as follows:

> "Said river port pilots may form themselves into an association or associations, as to them may seem fit, not in conflict with law or the rules and regulations of the river port pilot commissioners."

The substance of the complaint is that the law provides that before one may be commissioned as a pilot, he must serve an apprenticeship, and that unless he is admitted as an apprentice to the Crescent River Port Pilots

Association, there is no way of serving an apprenticeship, so that the Crescent River Port Pilots Association has within it the power to choose those whom they desire to become pilots. The appellants complain that they were not chosen as apprentices and, consequently, had no means of serving an apprenticeship, and thereby satisfying the requirements of the statute that they should serve an apprenticeship of six months.

THE CONSTITUTIONAL QUESTION.

The constitutional question posed is whether or not the Fourteenth Amendment to the Constitution gives appellants the right to demand of the Crescent River Port Pilots Association that they be chosen as apprentices in order that they might be commissioned as pilots. Inherent in that question is the right of the State of Louisiana to provide that only one who has served an apprenticeship may be commissioned as a pilot. Obtruding from that question is the further question as to whether the difficulty of the appellants in serving an apprenticeship makes the statute unconstitutional. Reduced to its lowest terms, the appellants contend that the State of Louisiana, if it provides that as a condition precedent to being commissioned a pilot, one must serve an apprenticeship, that the State must provide the means of serving the apprenticeship, when there are existing private means, or else the statute is an unconstitutional nullity. The Court must answer the question as to whether mere difficulty of achieving office is a ground for denying the well recognized sovereign power of a state to regulate pilotage within its borders.

It is undeniable that Congress has permitted the states to regulate pilotage insofar as such regulation does not trench upon the supreme power of Congress over pilotage as a part of interstate commerce. Congress has never imposed a limitation upon the states as to the measures chosen for state regulation of pilotage. It has left to the states the choice of means for such regulation. No case has ever declared that one has a constitutional right to become a pilot. No case has declared that states are limited in their choice of means for such regulation. The jurisprudence of this country has recognized the difficulties and dangers within the regulatory field, and has permitted the states a wide choice of the mechanics of regulation. Such regulation is a practical matter, based upon considerations of experience in the avoidance of danger, and the way in which best the public welfare may be served. Pilotage has always been considered from time immemorial as a calling different from any other calling and requiring measures of regulation wholly apart from the measures of regulation within other fields.

THE HISTORY OF PILOTAGE.

The history of pilotage is as old as the history of commerce between nations. Compulsory pilotage was known to Rome and Carthage. It existed prior to the Ordinances of the Hanseatic League passed in 1457. Sweden in the sixteenth century knew compulsory pilotage and its recognized principles continued to be accepted up to the first Congress of the United States and up to the present day.

By the Act of August 7, 1789, Section 4, Congress of the United States recognized the power of the various states to regulate pilotage. It also realized that conditions of navigation were not uniform throughout the then newly formed United States and although it had the power, as a part of commerce, to regulate pilotage in the various states, it provided, by the act of August 7, 1789, the following:

> "That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with existing laws of the states respectively wherein such pilots may be, or with such laws as the state may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress".

The State of Pennsylvania, in March, 1803, passed a law compelling ships and vessels of a burden of seventy-five tons or more, navigating the Delaware River, to take a pilot. The act provided that, should the master of any vessel navigating those waters refuse the services of a pilot when offered, such master shall forfeit the sum of $60.00. Cooley, the master of a vessel, who had been compelled to pay half pilotage fees under this law, sued the Board of Wardens of the Port of Philadelphia for the recovery of money so paid. The court held that the State of Pennsylvania had the power to legislate regarding pilotage because Congress had not exerted its authority over that field of regulation, but had left it to the states.

In *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 Howard 299 (143) (Decided December, 1851), the Court said:

"'Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress that the nature of this subject is such that until congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. It manifests the understanding of congress at the outset of the government that the nature of this subject is not such as to require its exclusive legislation. The practice of the states and the national government have been in conformity with this declaration from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of its superior fitness and propriety, not to say absolute necessity of different systems of regulations, drawn from local knowl-

edge and experience, and conformed to local wants' ".

* * * * * * *

"'We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quae frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; * * *"

In that case, the half-pilotage or penalties was to go to the support of widows and orphans of pilots. It was urged that this was a revenue statute instead of a regulation under the police power of the state. The court denied the contention and stated that his services were necessary in aid of navigation. The fact that the fund was dedicated to the support of widows and orphans of pilots was in recognition of the fact that at all times they were subjected to danger. It has been the practice of pilots, before the formation of associations, to put far out to sea and to proffer their services. The rivalry engendered between

individual pilots increased the danger to which they were normally subjected. It frequently happened that because of the inability of a pilot to return to shore, because of a lack of facilities, the boarded vessel carried him across the seas. In that situation, the families, for want of support, became destitute, and a charge upon the state. The formation of associations of pilots to destroy competitive rivalry and afford proper means of boarding vessels and returning to land, gave rise to the creation of associations of pilots. These associations were recognized and encouraged by statutes.

Ex Parte McNiel, 13 Wall. 236, sketches pilotage services, the dangers to which pilots are subjected and the need of governmental regulation. In that case, Banter, a pilot commissioned by the State of New York, libeled the "MAGGIE McNIEL" on the ground that he was the first pilot to tender his services to pilot the vessel by way of Hellgate to the Port of New York. He recited that the master refused his services and refused payment provided under the statute of New York. The constitutionality of the statute was attacked by McNiel on various grounds, but each of these grounds was repudiated.

During the course of the decision, the court said:

> "It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half-pilotage, as it is called, is a necessary and usual part of every system of such provisions. Pilots are a meritorious class, and the service in which they are engaged is

one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment.

* * * * * * *

THERE IS A LEGAL PRESUMPTION OF CONSTITUTIONALITY.

It must be conceded as a legal presumption that the Legislature of Louisiana, in enacting Act 54 of 1908, was guided by practical considerations. This presumption is re-enforced by the facts. The decision of the Louisiana Supreme Court was based upon the question of law as to the unconstitutionality of the statute as presented by the pleadings. The matter never reached a trial upon the facts, so that this court is without a knowledge of the facts upon which rests the legislation.

> "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way. *Otis v. Parker, supra.* Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legisla-

tion of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for over-throwing the statute'. *O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 257".*

Williams v. Mayor, 289 U. S. 36.

We believe we have the right to inform the court of the facts upon which the Legislature acted since the decision of the Supreme Court of Louisiana dealt only with the terms of the statute, and the record here contains no facts. This Court cannot reach a proper decision without a knowledge of the facts in the field over which the statute operates. The facts are indisputable and are here stated for the consideration of the Court.

HOW PILOTS OPERATE.

Since 1857, the Legislature of Louisiana has regulated pilotage from the Gulf of Mexico, through the Passes, and into the Mississippi River. It enacted Act 63 of 1877, Extra Session, and there was formed an association known as the "Associated Branch Pilots." It was necessary for these branch, or bar pilots, to own a boat, which went into the Gulf of Mexico and met incoming ships. The boat of the branch pilots was maintained by the Association, because no individual pilot could afford the costs of a boat going into the Gulf of Mexico and its maintenance and upkeep. Without the possession and use of such a boat, the functions of the bar pilots could not be properly performed.

Prior to Act 54 of 1908, there was no association of pilots piloting vessels from Pilot Town to the Port of New Orleans. The branch pilots met the ships in the Gulf of Mexico and piloted them over the bars which form at the convergence of the Mississippi River with the Gulf of Mexico. The branch pilots piloted the ships to Pilot Town, at which is located their main station. From there the ships were taken up the Mississippi River to the Port of New Orleans by unregulated river pilots. The river pilots had no association, with the result that the facilities for the performance of their duties were limited. A small number of pilots might form an association, in the nature of a partnership, but these pilots were under no system of regulation.

In 1908, the Legislature enacted the statute under attack, whereby it created the Board of River Port Pilot Commissioners to recommend to the Governor applicants for commissions as pilots. This act was in substance like Act 63 of 1877 under which the Associated Branch Pilots was created. The Legislature recognized the need of an integrated association, whose members could be controlled by a central authority, and authorized the commissioned pilots to form themselves into an association. Under the authority of Act 54 of 1908, an association named the "Crescent River Port Pilots Association" was created. The charter members made a contribution of capital, which was used in the acquisition of a pilot station and boats needed for the operation of the pilots.

At Pilot Town, there was erected and maintained a station. Pilot Town is approximately ninety miles from

the City of New Orleans. Pilot Town is nothing more than a collection of small buildings, built on stilts or piling driven into a swamp. The members of the Association, when on turn at Pilot Town, either live in the building of the Association, where they take their meals, or, some few have small buildings near the main house. Pilot Town can be reached by the Mississippi River. There is no road leading from the City of New Orleans to Pilot Town. There is a very bad country road leading from New Orleans to Venice, about 8 miles above Pilot Town, and in order to reach Pilot Town from Venice, it is necessary to take a boat. This situation compels, or at least impels, the river pilots to remain on the station between the time they arrive with an outgoing vessel, and the time they take an incoming vessel from Pilot Town to New Orleans. Pilots frequently remain on the station for several days at a time and are confined to very close quarters. They lead a common life and are thrown in intimate contact because of their inability to do otherwise. There is a general grocery store at Pilot Town which, for some of the pilots, serves as a kind of club.

No appellant before this Court has the constitutional right to eventually become a member of a community into which he might not be readily assimilated, but would forever afterwards remain as a foreign element, productive of strife instead of harmony. The usual qualities of human life do not make the need of serving an apprenticeship under the given conditions arbitrary and capricious, but, on the contrary, recognize human impulses and the qualities that make living in peace possible.

In the City of New Orleans, the Association maintains an office. This office operates for twenty-four hours a day, so that any ship requiring a pilot may telephone, and the pilot on turn is notified in time for him to reach the ship for the hour of sailing. Frequently, pilots are called at various hours of the night and the pilot next on turn must keep in constant contact with the office, so that he may be readily available when needed.

There is a Board of Directors of the Association, which regulates the conduct of the pilots. If a pilot fails to report at a ship when it is his duty to do so, he is disciplined; if he is negligent in the performance of his duty, he is subject to punishment; if he is guilty of gross misfeasance, he is severely punished. The punishment, of course, is commensurate with the offense, but the power of punishment which inheres in the Association is a means of keeping the members of the Association in line. There is a pension system, designed to permit the retirement of pilots when they become incapacitated or, for any reason, incompetent in the performance of their duties.

It must be readily apparent that the action of the Legislature in passing Act 54 of 1908 was not arbitrary or capricious, but that it envisioned the needs of regulation, and the methods by which such regulation should be achieved. It must be easily seen that the means of regulation rest upon solid foundations. None of the appellants presumably could, as individuals, maintain an office with the needed help to afford service to shipping at all hours of the day and night. Conceivably, no individual appellant could afford the purchase and maintenance of a pilot

boat needed to take the pilot from shore to ship. No individual pilot not subject to the power of punishment of an association, could be counted upon to respond to the call in weather good and bad. If left to his own devices, it might be readily conjectured that when conditions were favorable, he would respond to the call, but when conditions were bad; he might conceive some excuse for not taking out a ship. The piloting of a vessel on the Mississippi River during periods of fog, is one of difficulty and danger. Collisions have caused the loss of lives of both pilot and vessel crews because of the dense fog under which ships were moving, so that a pilot not subject to control by an Association might choose the good and avoid the bad.

The Supreme Court of Louisiana doubtless took judicial cognizance of the operations of pilotage under Act 63 of 1877 and the operations under Act 54 of 1908 in deciding the constitutionality of the latter act and of Act 134 of 1942. This Court does not have judicial knowledge of those facts and we, therefore, feel justified in their recital, with the thought that if they are not properly incorporated in the brief, they will be disregarded.

THE CONTENTION OF APPELLANTS.

The complaint here is that because the Crescent River Port Pilots Association has the only equipment and organization for training apprentices, that, therefore, the challenged legislation is unconstitutional. The statute does not say that only those serving apprenticeships under the direction of the Crescent River Port Pilots Association, shall be eligibile to commissions as pilots. It provides for

an apprenticeship, but does not designate the Crescent River Port Pilots Association as the sole means of serving that apprenticeship. The real cry of the appellants is that, because of practical conditions, they cannot serve an apprenticeship, and, consequently, cannot be commissioned as pilots. The attempted destruction of the legislation rests upon the difficulty of the appellants in satisfying a requirement for a commission as pilots. While, of course, it might be difficult for those desiring to become pilots to equip themselves with the needed boats and secure some pilot under whom they can serve an apprenticeship, yet, legally, that is not impossible. To substitute difficulty for impossibility as a mean to undermine the choice of legislation is to deny the power of the State in choosing means of regulation.

The Legislature authorized the commissioned pilots to organize themselves into an association. By such authorization, it recognized the fact that the individual pilot could not serve the general welfare as well as an association of pilots. Pilot Associations were not unknown to the Legislature, because such associations have existed from time immemorial. The need of a pilot boat, the need of men to man the boat to enable the pilot to board the ship and return the pilot to land, must have been known to the Louisiana Legislature when it enacted the challenged statute. No man could himself alone perform all of the acts requisite for a pilot to board a ship and return to shore. There must be a pooling of resources and that need was recognized by the authority to the pilots to form themselves into an association.

In granting the authority to form an association, which was a special grant, apart from the general statute for the formation of corporations, the Legislature doubtless recognized that the members of this Association live in such close community that they would want to choose those with whom they must, for a large part of their lives, live with. It did not impose upon those commissioned, as a condition precedent to forming the association, the obligation to admit into the association specified individuals. It did not say to the Association that it must admit as apprentices those possessing specified qualifications. It left to the members of the Association the choice of those whom they were willing to train for the possibility of being commissioned. Presumably, the Legislature thought that the members of the Association were best fitted to select those whom they desired as apprentices who might thereafter live almost a family life.

Your Honors can readily appreciate that if everyone who desires to become an apprentice was entitled to do so, and to share the daily lives of the commissioned pilots, that there might be introduced into the group men of different temperament, men of differing habits and conflicting views. This Association is not merely an association of men in a common calling with divergent ways of life, but is an association of men who, for many days, must live under the same roof, must share a community life and must fit themselves into that life, so that harmony and not strife shall be the order of their living.

A statute does not become unconstitutional merely because it has created a condition of affairs which pro-

hibits, except on stated conditions, the engagement in an occupation which is lawful, but subject to regulation in the public interest. If the provisions of such a statute have a reasonable relation to the object of their enactment this Court said:

> "Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77, and see, generally, *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (p. 659), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'" *Bayside Fish Co. v. Gentry*, 297 U. S. 422, 427-428.

AN ANALYSIS OF THE COMPLAINT.

An analysis of the complaint shows no violation of any of the provisions of the Fourteenth Amendment, nor a denial of any right guaranteed to the appellants by that Amendment. An analysis of the petition demonstrates these contentions. It is, therefore advisable to take up, paragraph by paragraph, the grounds of complaint alleged by the appellants.

After stating their status, the complaint proceeds as follows:

(1) In Paragraph 1, the petitioners allege that they are licensed river pilots, holding pilot licenses from the United States, and that they are well experienced and well qualified to act as pilots on the Mississippi River.

Nothing here stated asserts any constitutional right to be commissioned as a pilot.

(2) Paragraph 2 merely alleges that Act 54 of 1908 is unconstitutional, but no grounds are stated in that paragraph.

(3) Paragraph 3 alleges that Act 54 of 1908 provides for the appointment of a Board known as the "Board of River Port Pilot Commissioners for the Port of New Orleans" and for the commissioning of twenty-eight pilots to

> "be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels"

and that whenever there exists a necessity for more pilots, the Board of River Port Pilot Commissioners shall hold examinations of applicants for appointment.

This paragraph is merely a recital of the act. The appellants do not set out that there is a need of more river port pilots and that there is a need to hold examinations. However, a complete answer to any legal question raised by this paragraph, is that there is not shown that there is

a need for more river port pilots, and that the Board of River Port Pilot Commissioners have failed in their duty to so declare if there be such a need. The answer to the contentions implicit in that paragraph is that if the Board of River Port Pilot Commissioners is derelict in its duty in failing to declare the need for more pilots, if such need exists, and in failing to hold examinations, these are mere derelictions on the part of the Board of River Port Pilot Commissioners. The failure of an officer to perform his duty does not render a statute unconstitutional. If there be failure of performance of duty, the remedy is executive, or legislative and not judicial by a declaration of unconstitutionality. Under the statute under attack, the Governor may remove these Commissioners for cause and certainly a failure to carry out the duties imposed by the act would be cause for removal. The failure to invoke the executive power of the Governor is no substitute for successfully claiming the unconstitutionality of the statute appointing the officers. The remedy, if any be needed, is to compel by the compulsion of the Court the performance of their duties by the Commissioners.

(4) Paragraph 4 sets up that under Act 54 of 1908, pilots commissioned by the Governor have the exclusive right to pilot vessels from the Passes to the Port of New Orleans, and that Act 134 of 1942 extends the exclusive jurisdiction of the commissioned pilots to include the Port itself.

Nothing therein said vitiates the constitutionality of the statute under attack. The right of a state to create a monopoly of pilotage by limiting the number of pilots,

has never been questioned. The limitation is not one of grant to individuals to eliminate competition, but is for the good of the State, so that pilots may be fairly remunerated for their services, and because of such remuneration thereby attract a better class of men.

(5) Paragraph 5 alleges the law is unconstitutional because:

> "It contains no provisions for competitive examinations and lays down no rules for the Board to follow in the commissioning of pilots, but, on the contrary, the act vests in the Board arbitrary powers in that connection."

This paragraph contains no facts which show the action of the Board of River Port Pilot Commissioners to be arbitrary. It, however, does contain a misconception of the statute because the Board of River Port Pilot Commissioners has absolutely no power to commission anyone. The Governor alone has the power to commission pilots. The Fourteenth Amendment does not nullify a statute because competitive examinations for commissions are not required. Pilots properly commissioned

> "have been held by this court to be state officers. 14 Ann. 7, 33 Ann. 230". (*Levine v. Michel*, 35 La. Ann. 1121).

There is nothing in the Constitution of the United States that requires that a statute providing for the creation or appointment of officers is unconstitutional, if it does not provide for competitive examinations. The method of choosing state officers is wholly within the purview of the powers of the State.

(6) Paragraph 6 alleges:

> "The defendant board has always assumed and exercised arbitrary authority in respect to the commissioning of pilots. No examinations have ever been held by the defendant board. Appointments have always been made on a personal basis—the appointee being first "elected" by vote of the members of the Crescent River Port Pilots' Association, an organization composed exclusively of commissioned river pilots".

It further alleges that in a vast majority of cases, the appointees have been kinsmen of one or more of the pilots, and membership as a commissioned pilot has been closed by the defendant board to all except those having the favor of the pilots themselves. No single word of this paragraph points to the unconstitutionality of the questioned statute.

If the Board of River Port Pilot Commissioners has acted unfairly, to the prejudice of the appellants, the remedy lies, either with the Governor, or the courts, to compel the performance properly of its duties by the Commission. No act or acts of the commissioners can strike with unconstitutionality a statute validly enacted by the Legislature. If it were otherwise, the constitutionality of a statute would rest upon the conduct, good or bad, of those charged with its administration.

Appellants cannot complain because the Governor, in the exercise of his authority, appoints those who are closely related to other pilots, instead of ignoring such rela-

tionship, and appointing the appellants. It must be conceded that the appellants have no vested right to appointment as pilots, and, consequently, cannot complain because the Governor choses to appoint others as pilots. The Legislature has conferred upon the Governor an unlimited choice and that choice cannot be restricted judicially, in defiance of the Legislative purpose to permit the Governor an unlimited choice. Whomever he chooses to appoint comes within the purview of his powers, and even though the appointment may be the subject of criticism, yet, if the appointee comes within the terms of statutory eligibility, the courts cannot interfere with the appointment. The reasons which move the Governor to the appointment are beyond inquiry by the courts.

(7) Paragraph 7 gives a list of those who have been commissioned pilots in 1938 and in 1944, and alleges their relationship to pilots then commissioned and to former commissioned pilots.

If those who have relatives in the Association are fortunate enough to be commissioned, the statute, expressing a legitimate power of the State, is not rendered invalid. Everyone cannot be commissioned as a pilot when there is a limit on the number of pilots. It is no function of the court to substitute its judgment as to who should become an officer of the State for the authority of the Governor.

While time cannot give the accolade of constitutionality to a statute, yet, when a statute is assailed, the existence of like legislation over long periods may be considered one of the badges of constitutionality. When

statutory enactments affecting the general public have remained unassailed for a long period of time, while freedom from attack may not endue the statute with constitutionality, yet it may be a decisive factor in deciding as to whether or not the legislation is capricious and arbitrary. Where legislation has endured for a long period of time, and unassailed practices have grown up thereunder, courts are inclined to conclude that the choice of methods of regulation is neither capricious nor arbitrary. The force of reasoning forces the conclusion that if such legislation were capricious in choice and arbitrary in enforcement that complaint would have been made of the wrongful nature of the statute.

Act 54 of 1908 was modeled after Act 63 of 1877, which is the statute regulating the bar or branch pilots. Under Act 63 of 1877, the commissioned pilots were authorized to incorporate themselves, and under that authority, a corporation known as "The Associated Branch Pilots" was created and has since operated.

Under Act 54 of 1908, the Crescent River Port Pilots Association has operated under like circumstances as "The Associated Branch Pilots". Neither the legislation creating "The Associated Branch Pilots", nor the operations or practices under that statute have been the subject of attack. When the Legislature enacted Act 54 of 1908, it had before it the experience and the history of the operations under Act 63 of 1877. It was advised, therefore, that there had been no complaint against the enactment of Act 63 of 1877, and, therefore, was justified in

believing that no rights of others had been invaded, or else there would have been complaints through the courts. As a principle of law, it was, therefore, justified in adopting Act 54 of 1908 modeled after Act 63 of 1877.

(8) Paragraph 8 merely amplifies the contention that most of the commissioned pilots are related to other pilots.

The same answer is controlling here. The appellants have no constitutional right to be chosen as pilots and be commissioned by the Governor in preference to those who have been commissioned.

(9) Paragraph 9 alleges that some of the petitioners have made formal application to the defendant Board to be considered as applicants for the examination, but that their applications were ignored.

If these applicants have any vested right to be examined as to their competency, or if the Board of River Port Pilot Commissioners failed in their duty, the remedy is to compel these commissioners to hold the examination, or to appeal to the Governor for their removal for non-feasance. Those simple remedies cannot be substituted by over-turning a statute of the State on the ground it violates the Fourteenth Amendment. The appellants have no right under the Fourteenth Amendment to demand that they be examined. Dereliction of duty by the Board of River Port Pilot Commissioners does not generate the unconstitutionality of a statute under which they have been appointed.

(10) Paragraph 10 alleges that heretofore the appellants could not pilot between the Port of New Orleans and Pilot Town, except the pilotage of coast-wise vessels, and that their former right to pilot in the Port of New Orleans was abrogated by the Amendment by Act 134 of 1942. They allege that by that Amendment, they are not able to pilot foreign trade vessels within the port, and that there is not sufficient pilotage of coast-wise vessels to and from Pilot Town, so that they are deprived of earning a living. Pilotage is not the only means of earning a living. However, the Amendment does not prevent them from piloting coast-wise vessels, but simply reduces the field in which they may operate. The reduction of the field of their operations cannot render the act unconstitutional since the Legislature had plenary power to pass the act and to limit the field of operations.

Under Act 63 of 1877, the Legislature mapped out the route over which the branch pilots were to operate, and there was no challenge to its power so provided. Under Act 54 of 1908, it prescribed the route over which the river pilots were to operate. There was no challenge to the exercise of that power, long recognized by the courts of the country.

In enacting Act 134 of 1942, it exercised no greater power than it had exercised in the legislation of 1877, and in the legislation of 1908. If it had the power and the authority to pass these two prior acts, it had an equal power to regulate the practice of pilotage within the Port of New Orleans. That power is undeniable, and, as was said in *Olsen v. Smith, supra*, it is one constitutional belonging

to the states. As was said in that case, the complaint was not against the constitutional power of Texas, but was against what the appellants claimed to be an unwise use of such power. The complaint here does not deny the sovereignty of the State of Louisiana over pilotage, but questions the nature of the legislation as making it difficult, but not impossible, for the appellants to be commissioned as pilots. The test of the constitutionality of the statute is not how it affects an individual, but whether or not the Legislature of Louisiana had the authority to create the statutes. The question of wisdom or unwisdom in the enactment of a statute may be gauged by the fact that two like statutes have operated without complaint since 1877 and 1908 respectively. The justification for the act of 1942 has its source in the two prior acts regulating pilotage between the Port of New Orleans and to the Gulf of Mexico. Since the State had the right to create these two pilotage routes, it had the right to regulate pilotage within the harbor of New Orleans. Doubtless experience after 1908 demanded the need of regulation provided by Act 134 of 1942.

The law of Louisiana provides that the Governor may commission pilots only when there has been certified to him by the Board of River Port Pilot Commissioners, the need of additional pilots. The complaint fails to show such a certification of the need for additional pilots and thereby put in operation the power of the Governor to commission pilots and their alleged right to a commission. If there are no vacancies to which the appellants might be appointed, then, there are no commissions denied them since the power of the Governor to commission any one of

the appellants as a pilot is non-existent. However, even if there be additional pilots required, it is not shown that even if they had the ability to successfully pass the examinations, *that the Governor must appoint any one of them as a pilot.*

Certainly, there is nothing to show that all of them could be appointed, under the most favorable conditions, because it might readily be conjectured that the Board of Commissioners would certify the need of one or two pilots, whereas there are seven appellants. Could any court say which one or two of these appellants are entitled to a vacancy and be commissioned as pilots? If the Board of Commissioners should certify that only two additional pilots are needed, could any court dictate to the Governor which of two needed pilots should be commissioned from among the seven appellants? If the court could not command the Governor to an appointment of two out of seven of the appellants, then, can it command him to the appointment of any person from among the general public. If a court could command the Governor, in case of two existing vacancies, to appoint two designated appellants out of the seven, then, what right could the others assert? They would have no right then, and so can have no right now. If five or six out of seven have no right to one or two vacancies, has any of them the right to stand before the Court and claim the unconstitutionality of the statute? They do not belong to a class entitled to be commissioned, since they do not assert any power to create vacancies which presently do not exist, and do not have the right, under the statute, to be appointed to non-existing vacancies. Since

they cannot question the right of the Legislature to provide for a limitation of the number of pilots, they show no right which can be asserted in a court of law to emasculate the power of the Louisiana Legislature in the creation of methods for regulating pilotage.

It is fundamental in reason and in the law that they have no vested right to be commissioned by the Governor as an officer of the State, or to operate over any given course. It must be conceded by a long line of authority that the State has the right to regulate pilotage and where the statute infringes on no constitutional right, it is beyond attack. The right of a state to limit the number of pilots, or the routes over which pilots are to operate has long been recognized and never seriously doubted in the jurisprudence of the courts of the United States. The complaint of the appellants in no way states an invasion of their constitutional rights, because nowhere do they show the guarantee of a right to become a pilot over a given route or designated area.

Analyzed, the complaint is merely that the Board of River Port Pilot Commissioners has failed to properly perform its duty. However, it is clear that the failure of an officer to perform his duty is not an infirmity of the statute by which he was appointed, so as to make the statute unconstitutional. The remedy of the appellants is to appeal to the courts for the enforcement of the duties of the Board of River Port Pilot Commissioners, or to apply to the Governor for their removal, and failing in either or both places, seek legislative correction. The Legislature has the power of decision and it is in that forum

that the cry of the appellants should ultimately be raised in case of failure in other places.

> "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right. *Tyler v. Judges*, 179 U. S. 405; *Plymouth Coal Co. v. Penn.*, 232 U. S. 530, 544; *Lehon v. City of Atlanta*, 242 U. S. 53, 56;" *Akins v. Kingsbury*, 247 U. S. 484, 489.

Has such a showing been made by these pleadings when the complaint shows that the wrong asserted, in substance, is not the exertion properly of the power of the state but the conduct of its officers.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The case is ruled by *Olsen v. Smith*, 195 U. S. 332, and *Ring v. Oregon*, 276 U. S. 607. *Olsen v. Smith*, affirmed the constitutionality of a Texas statute which, in substance, is the same as the legislation under attack here. *Ring v. Oregon* came here on error to the Supreme Court of the State of Oregon, upholding the constitutionality of a similar statute. It was argued here on December 13th and 14th, 1927, and was decided on March 19, 1928, by a *per curiam* opinion reading:

> "Affirmed on the authority of *Olsen v. Smith*, 195 U. S. 332, 342, 343, 345."

Olsen v. Smith, supra, sustained the power of the State of Texas to enact regulatory legislation. The Texas

law, like the Louisiana law, provided that the Governor of the State should appoint "a Board of five persons of respectable standing, to be known as Commissioners of Pilotage". To the Board was confided the power to fix charges to "regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, suspend them until the Governor shall act in the matter." Upon the Governor is conferred the authority to appoint such number of branch pilots as may, from time to time, be necessary, each of whom shall hold office for two years, "*subject to removal by the Governor at pleasure,*" and anyone who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots.

The difference between the Texas law and the Louisiana law is that the Board of River Port Pilots Commissioners is composed of three members, whereas the Texas Board was composed of five. The nature of their powers and duties is substantially the same. The term of appointment of the Texas pilot is for two years. Noteworthy of that statute, however, is that each of the pilots so appointed "is subject to removal by the Governor at pleasure". The attack upon that law included an attack upon its constitutionality as being violative of the Fourteenth Amendment of the Constitution of the United States.

The court, in disposing of the attack made by Smith and others upon the law which prevented them from pilot-

ing the vessels, except in conformity with the statute, among other things, said:

> "It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justi-

fied such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises".

In the reply brief of appellants on the motion to dismiss, it is said that appellants, with insistence and vehemence, say that *Olsen v. Smith, supra,* when considered, does not support the contention of the appellees. It is said that in order to understand the decision in *Olsen v. Smith, supra,* the jurisprudence leading up to its decision must be reviewed. The opinion in *Olsen v. Smith,* speaks for itself and this Court does not need the enlightenment of a decision by the Texas court. *Olsen v. Smith,* by its reasoning and principles, supports itself without the need of aid by the courts of Texas.

Counsel quoted at length from *Petterson v. Board of Commissioners,* 57 S. W. 1002, in which the Texas statute was attacked by the plaintiff on the same ground as is urged here. During the course of the opinion, the court adverted to the fact that pilots were permitted to choose deputies, who subsequently became eligible for commissions as pilots. During the course of the opinion, the court said that the requirement that the applicant should have served an apprenticeship, if directory, did not nullify the statute, and said that "it seems to be so", and the Governor could ignore it. Just how the court reached the conclusion that the prescription of the Legislature for an

apprenticeship could be ignored by the Governor is not supported by any reasoning. This case was not appealed.

When *Olsen v. Smith, supra,* came before the Texas court, the legislation was upheld, but was not upheld upon the theory that the provision for an apprenticeship was merely directory, subject to being disregarded, and was, therefore, not mandatory.

In *Olsen v. Smith,* the Texas court said:

> "The assignments are in substance, that our statute violates section 1 of the Fourteenth Amendment of the Federal Constitution, and Section 19, Art. 1, of our State Constitution, in prescribing the qualifications and regulating the appointment of branch pilots. Upon this subject much might be written. But in view of the universality of such laws, and their long observance and enforcement in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation. *Steamship Co. v. Joliffe,* 2 Wall. 450, 17 L. Ed. 805. The subject comes fairly within the scope of governmental or police functions. We consider the case of *Petterson v. Board,* (Tex. Civ. App.) 57 S. W. 1002, as deciding the question raised by these assignments against the contention of appellant".

Your Honors will, therefore, see that in deciding *Olsen v. Smith, supra,* the Texas court in its reasoning, did not rely upon the reasoning of *Petterson v. Board,* but

turned to the universality of laws regulating pilotage and the object of such laws as the basis of the decision. The Texas court had already upheld the constitutionality of the Texas statute, and it was, therefore, proper to refer to the case in which the validity of the statute had been declared. However, it is a universal rule that a court, supporting the validity of a statute by a prior decision, does not necessarily adopt the reasoning upon which the decision rests. The decision and not the reasoning is the law. It frequently occurs that the constitutionality of a law is declared by differing reasoning, expressed in concurring opinions. Neither the reasoning of the original opinion, nor the reasoning of the concurring opinion is the law of the case. The law of the case is the decision of constitutionality, or of unconstitutionality, reached possibly by different roads of reasoning. It follows conclusively, therefore, that the case of *Petterson v. Board* has absolutely and utterly no place in the argument of this case.

The reasoning of *Olsen v. Smith*, *supra*, which does not include the reasoning of *Petterson v. Board*, may be related to the reasoning of this court in its final decision, but it must be apparent that only the reasoning in *Olsen v. Smith* decided here, is of any consequence in the present argument. It may well be that the constitutionality of the Texas statute was sustained by this court by wholly different reasoning, but regardless of the modes of reasoning, the decision here in *Olsen v. Smith* should conclude the issue.

Bradwell v. The State, 16 Wall. 130, 142:

The Fourteenth Amendment is not the means of fulfilling every desire to engage in a particular occupation. Many occupations are beyond the limitation of the Fourteenth Amendment. The Fourteenth Amendment was designed to protect the elemental rights which belong to one as a human being, but was never intended, nor does it guarantee, the fulfillment of every wish of the citizen. The power of the State to regulate many occupations and, through such sovereign power, to deny entrance to certain fields of endeavor is axiomatic. *Bradwell v. State, supra,* exemplifies the legal concept and demonstrates its application. In that case, Mrs. Myra Bradwell applied to be admitted to the Illinois bar. For no greater reason than that she was a woman, the Supreme Court of Illinois refused her admission as a member of the bar. She applied to this court, urging that the action of Illinois was arbitrary and denied her a right guaranteed by the Fourteenth Amendment.

The court in denying her any relief said:

> "The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age,

sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States."

In Re Lockwood, 154 U. S. 116:

Bradwell v. The State was not a vagrant expression of principle but a stated conclusion as to the meaning of the Fourteenth Amendment. It was followed in *In Re Lockwood*, 154 U. S. 116. Belva A. Lockwood applied to be admitted to the Virginia bar, but was denied admission by the Supreme Court of Virginia, and in her application to this court "she alleges that the only reason for the rejection of her application was that she is a woman."

If under the Fourteenth Amendment she had a right to be admitted to the Virginia bar, the refusal of admission

on the grounds she was a female would not be a constitutional ground. If under the Fourteenth Amendment, she was entitled as a matter of right to be admitted to the bar of Virginia, that State could not empty the Fourteenth Amendment of its protection regardless of whether the reason was good or bad. In denying her application for a mandamus to the Supreme Court of Virginia, this court said:

> "In *Bradwell v. The State*, 16 Wall. 130, it was held that the right to practice law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."

Lehon v. City of Atlanta, 242 U.S. 53:

Reduced to its ultimate contention, the appellants claim that the State of Louisiana has chosen a wrong method of regulating pilotage and because of the choice of a wrongful method, the statute violates the Fourteenth Amendment. That the States have wide latitude in the mechanics of regulation is illustrated by the case of *Lehon v City of Atlanta, supra.* This court recognized the power of regulation in the State of Georgia of the business of carrying on a private detective agency. It recognized the fact that the public welfare is paramount to the desire of one desiring to engage in an occupation having

a direct relationship to the good of the State. The principle of the cited case is decisive here. That case and this case involve the police power and the medium of its exercise.

Lehon was convicted of failing to comply with a city ordinance, subjecting the business of a private detective to police supervision, and providing that no one shall carry on such a business without first being recommended by the Board of Police Commissioners and taking the oath of a city detective. Lehon complained of his conviction under the ordinance on the ground its requirements offended "the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States." The analogy between that case and this case is that pilots are commissioned upon the approval of the Board of River Port Pilot Commissioners. In the cited case, the recommendation lay with the Board of Police Commissioners. Each board or commission was created under the police power of the state.

The court, in holding that the requirement of the ordinance did not contravene the Fourteenth Amendment, said:

> "The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the State has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very common-place to say

that the exercise of police is one of the necessary activities of government and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the State, have the stamp of the State as to fitness and character, take an oath to the State for faithful execution of its duties and give a bond for their sanction. This the State may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other State."

The regulation of the business of a detective agency is not more important as a governmental power and duty than is the regulation of pilotage. From the earliest days of the Constitution the importance of pilotage and its regulation has been recognized by Congress and the states. If it were constitutional for the State of Georgia to permit the exercise of the business of a private detective only upon the recommendation of the Board of Police Commissioners, so, equally, the State of Louisiana has the power to permit the business of pilotage to be exercised only upon the recommendation of a Board of River Port Pilot Commissioners. Since the State of Louisiana has the power to regulate, and inherent in that power, to provide the means of regulation, the appellants in this case cannot complain of the means chosen for the exercise of the power. Once the power be admitted, the sanction for the exercise of the power lies clearly within the choice of the State. If the State ex-

ercises its right of choice, there can be no violation of a constitutional right guaranteed by the Fourteenth Amendment.

These cases so clearly expressive of the law should suffice for the decision here. It would serve no useful purpose to parade the various cases showing the power of the State to regulate various occupations free of the prohibition of the Fourteenth Amendment. One may not engage in the sale of liquor as a matter of right, but must comply with the regulations provided by the State. The Fourteenth Amendment is no open sesame to enter into the business of selling liquor. *Crowley v. Christensen*, 137 U. S. 86. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which the States are forbidden to abridge. *Bartemeyer v. State of Iowa*, 85 U. S. 129, 18 Wall. 129. A State has reserve police power to regulate occupations in which the public have an interest and the regulation of which is necessary for the general welfare. The exercise of such police power is not an abridgment of the privilege and immunities of citizens guaranteed by the Fourteenth Amendment. *Premier-Pabst Sales Corporation v. Grosscup*, 298 U. S. 226. The tendency of the courts is to recognize the good of the State and to place the general welfare above rights claimed under the Fourteenth Amendment where there is no discrimination shown. The trend of the law is to recognize the legislative power in the choice of methods conceived for public protection. *Philbrook v. Newman*, 85 Fed. 139; *Steinbach v. Metzger*, 63 Fed. (2d) 74. A law of Arizona requiring all flagmen on railroad trains to have at least one year's experience as brakemen

is not in violation of the Fourteenth Amendment as abridging the privileges or immunities of citizens. *Simpson v. Geary*, 204 F. 507.

Yick Wo v. Hopkins, 118 U. S. 356:

This case is the chief reliance of the appellants for success. They allege no discrimination against them created by the statute, but complain that the Legislature has unwisely enacted a regulatory statute. The relief, if any, to which they are entitled is legislative and not judicial. If the legislation is unwise, and works undue hardship upon any body of citizens, the remedy is in amending legislation. There is no discrimination aimed at, or practiced upon, the appellants, nor do they allege such discrimination. They allege merely an inability, because of the mechanics of the statute, to be commissioned as pilots. The difference between this case and *Yick Wo v. Hopkins, supra*, is found in the reasoning of *Gundling v. City of Chicago*, 177 U. S. 183, as follows:

> "The case principally relied upon by the plaintiff in error is that of Yick Wo v. Hopkins, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with

reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some two hundred other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

'The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such

cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature'."

What is discussed in *Yick Wo v. Hopkins* is the protection of a right guarantted under the Fourteenth Amendment to the Constitution of the United States to engage in a common calling. Pilotage is not a common calling. The statute there under attack was designated to deny to Yick Wo, by devious methods, the right to engage in the laundry business, while permitting others, under like circumstances, to so engage. The law was a discrimination against Chinamen, by denying them the right to engage in the business in which others were permitted freely to engage. Yick Wo required no commission from the Governor of California to put a gloss on shirts and collars and to carry a laundry basket. He was entitled, as a citizen, to engage, under like conditions, with others engaged in the business. The ordinance there held unconstitutional was designed and enforced to deny him his right, because he was a Chinaman. Under the Constitution, he had the same right as any other citizen to engage in the laundry business, notwithstanding he was of Chinese origin. Under the law of Louisiana, everyone is not of right etitled to become a pilot, but only those commissioned by the Governor are so entitled. The rule quoted by counsel for plaintiffs in *Corpus Juris Secundum*, supra, buttresses the distinction between the *Yick Wo* case and the case at bar.

Houston Port Pilots v. Goodwin, 178 S. W. (2d) 308, decided by the Supreme Court of Texas, is quoted at

length by appellants. The quotation aptly describes the difference between that case and the case at bar. It is said in counsel's brief, quoting an excerpt, the following:

> "The court in dismissing that allegation as the basis of a judgment in favor of plaintiff said:
>
> 'But even if one would be justified in concluding that the Board had been so unmindful of its duties and responsibilities as to surrender its judgment to the commands of the Columbia River Pilots Association, nevertheless, that circumstance alone would not entitle the petitioner to succeed. It would still be incumbent upon him to satisfy this court that he possessed the qualifications to capably discharge the duties of a pilot.'"

State v. Board of Pilotage Commissioners, 198 Wash. 695, 90 Pac. (2d) 238, is cited in support of the contention of the unconstitutionality of the Louisiana statute. The issue there was wholly apart from the issue here. In that case, the Board of Pilotage Commissioners was constituted solely for the purpose of holding examinations and issuing licenses. The court very properly said that any act

> "which would vest in the Board arbitrary power to license one applicant and refuse to license another, although qualified in every respect",

would be unconstitutional. No one doubts the force of that reasoning. The Board of River Port Pilot Commissioners in Louisiana is not empowered to grant or to withhold licenses at will. The members are commissioned solely for the purpose of holding examinations and certi-

fying to the Governor that the applicants have the requisite qualifications provided by the statute. The Governor alone, who is an officer of the State, has the power to issue the commission.

A fundamental distinction between the case at bar and the case arising from the State of Washington is that here the court is asked to declare unconstitutional a statute regulating pilotage on the ground that the Pilot Commissioners are showing favoritism. The case in the State of Washington dealt, not with the unconstitutionality of the statute under which the Board of Pilot Commissioners was acting, but the gravamen of the complaint was that although properly clothed with authority under a statute constitutionally enacted, that nevertheless, by showing favoritism, they were discriminated against. The court was asked in that case, not to declare the statute nullified by the conduct of the Commissioners, but the court was asked to compel the commissioners to hold examinations and to issue a license to the complainants, since they were by law entitled to the examination and, by the same statute, were entitled to be commissioned if found competent. The remedy invoked was mandamus. The mandamus was granted, but the statute under which Commissioners acted was not destroyed.

The distinction between the case at bar and the cited case of *State v. Board of Pilotage Commissioners, supra*, is found in the brief of appellants, who quote from the cited case to the following effect:

> "In the *Olsen case, supra*, the constitutionality of a pilotage act of the State of Texas was questioned,

> on the theory that the Legislature had no right to attempt to regulate pilotage services, as it was not subject to governmental control. This act conferred upon the Governor of the State of Texas the authority to appoint any number of branch pilots that might from time to time be necessary."

This was said in pointing out the difference between the Texas statute and the Washington statute.

Certainly, the Washington state court recognized the distinction between the case which it was deciding and the *Olsen* case, as expressed in the excerpt just recited.

State Ex Rel. Biscayne Bay Stevedoring Company v. Florida, et als., 143 Fla. 424, 196 So. 816:

State ex rel. Biscayne Stevedoring Company v. Turner, et als., is wholly inapposite here. The Supreme Court of Florida in that case was not dealing with the unconstitutionality of a statute regulating pilotage, but was dealing with improper conduct on the part of pilot commissioners, acting under a constitutional statute. In that case, the pilot commissioners refused to issue to the Biscayne Bay Stevedoring Company a permit to engage in the stevedoring business at Port Everglades, Florida. From 1936 until 1942, it had issued to the stevedoring company a permit, but in 1942, refused to grant a permit. The stevedoring company mandamused the pilot commissioners to issue the permit on the ground that their action was arbitrary and capricious, and denied them a right which should have been accorded them under the statute of Florida. They did not question the validity of the statute,

but denied the rightfulness of the conduct of the pilot commissioners. The court held that under all of the facts of the case, the stevedoring company was entitled to the statutory permit, and that the pilot commissioners had acted beyond the statute under which the stevedoring company was claiming. It, therefore, ordered the pilot commissioners to issue the permit, but in no place, declared the statute unconstitutional, nor referred to any relevant provision in the challenged statute here.

It is true that interpreting the statute, it stated the undeniable principle imbedded in *Yick Wo v. Hopkins*, 118 U. S. 356, that the right to engaged in a lawful business on equal terms with others is not dependent upon the will, caprice or any other motive of a single individual, or a group of individuals. In that case, the court recognized the fact that the pilot commissioners were animated by a desire to favor a competitive stevedoring company, and, in the promotion of that purpose, gave to relator a limited license to perform stevedoring work for Lykes Brothers Steamship Company and the French Line. This was in clear derogation of the authority conferred by the statute and the power of the court was exerted not to siphon out the power of the Legislature in enacting the statute, but, on the contrary, in carrying out the legislative purpose for a proper performance of their duties by the commissioners appointed to administer the law. *Yick Wo v. Hopkins, supra* is not related to the nature of the litigation, nor the ultimate determination of that case. The Florida case involved an interpretation of a state statute and the obligation of the officers charged with its administration to perform their duties.

Williams v. Molther, 198 Fed. 460 and *Williams v. Pope*, 215 Fed. 1000, are equally inapposite here. In each case, the applicant complained of the fact that the Local Inspectors of the United States had refused to examine the plaintiff for licensing as a pilot. There are no restrictions upon the number of Federally licensed pilots, and anyone who passes the examination is entitled to a license. In each case, the plaintiff complained that he was denied the right to an examination, which was the only requisite for securing a license. The court very properly held that the local inspectors could not, either wilfully refuse to examine the applicant nor could these local inspectors make rules not authorized by the United States statutes regulating pilotage. Here, the State of Louisiana has provided for examinations, but such examination successfully passed does not necessarily entitle the applicant to be licensed. The Governor is empowered to commission, and no restriction is placed upon his executive power to grant or withhold commissions.

Ring v. Patterson, 170 Ore. 234, 1 Pac. (2d) 1105, is quoted, doubtless with the thought of bringing the allegations of this case within the reasoning of the Oregon court. The difference between that case and this case is that the Board of Pilot Commissioners in Oregon were not empowered to issue commissions to pilots as state officers, but merely to hold examinations. It was charged that it held examinations only for those favored by the Columbia River Pilots Association, and would not grant the applicant a license unless he would become a member of that

organization. The Oregon court, in disposing of that contention, said:

> "But even if one would be justified in concluding that the Board had been so unmindful of its duties and responsibilities as to surrender its judgment to the commands of the Columbia River Pilots Association, nevertheless, that circumstance alone would not entitle the petitioner to succeed. It would still be incumbent upon him to satisfy this court that he possessed the qualifications to capably discharge the duties of a pilot."

Paraphrasing the words of the Oregon Supreme Court, we say that, even if the appellants in this case should possess the qualifications necessary to be commissioned as pilots, they would still have to convince the court that they are entitled to be commissioned by the Governor. To follow the implied argument of the appellants, your Honors would have to hold, if the appellants here could show that the Governor of the State had been influenced and dominated by the Crescent River Port Pilots Association and granted commissions to favored applicants, that fact would entitle your Honors to substitute the judicial process for administrative power and grant commissions to the appellants. Since the Legislature did not limit the choice of the Governor, nor provide that if he should listen to the urging of members of the Crescent River Port Pilots Association that the judiciary might then commission pilots, your Honors are without power to issue commissions to these appellants. Without such commissions, they are not entitled to act as pilots within the range covered by the Statute.

City of Seattle v. Gibson, 96 Wash. 425, 165 Pac. 109, is quoted in support of the contention of the plaintiff. One could not reasonably doubt the correctness of the reasoning and decision in that case. With equal reasoning, however, one might challenge its application here. In that case, an ordinance of the City of Seattle was attacked on the ground that it permitted a group of individuals to decide who should exercise the calling of a druggist in the City of Seattle. No one for a moment could question the unconstitutionality of such an ordinance and the court unhesitatingly declared it as unconstitutional.

The reasoning in *Highland Farms Dairy v. Agnew*, 16 Fed. Sup. 575, held that an act vesting a board with absolute power to grant or refuse licenses to engage in the dairy business was unconstitutional. To the same effect is *Liebermann v. Van DeCarr*, 199 U. S. 552, 26 Sup. Ct. 144.

CONCLUSION.

The appellants do not attack the power of the State to pass the act, but complain of the conduct of the Commissioners appointed under the statute. These commissioners cannot render the statute unconstitutional by dereliction of duty. These Commissioners do not have the power to grant or withhold commissions as state officers. They have only the authority to hold examinations, and to certify to the Governor the competence of those passing the examinations. If they fail to hold the examinations, the remedy is two-fold. They may apply to the courts to com-